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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS, RESPONDENT.

REPLY TO RESPONDENT'S BRIEF.

Respondent's Statement of Facts Incomplete.

The brief for respondent assumes to give in detail the facts and in particular the testimony of respondent as to the severity of the lurch. For the most part the quotations of the evidence are drawn from pages 19, 21 and 37 of the record.

This testimony was clearly modified by respondent in a later phase of his examination. (R., p. 39.) This has been set out in petitioner's original brief. Respondent there says that the lurch was unusual only for those about to board the train.

The lower Court clearly accepted this view of respondent's testimony. It is reflected in the instruction granted petitioner at the close of page 12 of the record.

The degree of the lurch was further clearly illustrated by the undisputed fact that the flagman was standing up in the caboose, the car respondent was attempting to board, and was sweeping out the car. He felt no unusual movement and was not thrown. (R., p. 69.)

In the argument here as to the correctness of the action of the trial Court in refusing to direct a verdict for petitioner, these facts are omitted from respondent's consideration. The entire argument is based upon the assumption that the lurch was negligent under all conditions. And this assumption is contrary to respondent's own testimony and that of all other witnesses.

Respondent's Statement in Brief That Fireman Knew Incorrect.

And respondent in his brief says the following:

> "Respondent also testified that this lurch or jerk of the train was given at a time when the fireman, who was sitting instead of the engineer on his, respondent's, side of the train, taking signals from respondent, and when he knew, or could have known respondent was about to board the train." (Page 7 of respondent's brief.)

This is a statement made to bring this case within the rule of the Behmyer case, 189 U. S. 486, 32 Sup. Ct. Rep. 622.

There is absolutely no basis for this statement to be found in the record. Respondent does not say it. He does not attempt to say it. Respondent signalled the train ahead. He was on the left side, the fireman's side. (R., p. 28.) The fireman, to put the pertinent part of his testimony in narrative form, said:

"I highballed Mr. Wells and he highballed me back. Highball means we are leaving the station. After he highballed me back I got down in the deck and went to firing." (R., p. 64.)

On cross-examination the fireman says:

"Q. And you knew where he was at the time?

A. That is when I got the highball.

Q. You don't know whether he was ordered to do anything after that time by the conductor, do you?

A. No, sir.

Q. You don't know what became of him after you saw the highball?

A. Became of Mr. Wells.

Q. Yes.

A. No sir.

Q. You didn't see him any more—you went on to shoveling in coal?

A. Sure—I didn't see him anymore." (R., p. 66.)

This excerpt clearly shows that the fireman did not known that the respondent was not on board the train. Respondent gave this fireman the signal that he and his part of the train were ready to go. The facts are entirely contrary to the statement in respondent's brief. The fireman did not know that respondent was not on board. On the contrary, he had been assured by respondent that everything was all right.

Behmyer Case Supports Petitioner.

Reliance is placed by respondent on the case of Texas Pacific Railway Company *v.* Behmyer, 189 U. S. 468, 47

L. Ed. 905, 32 Sup. Ct. 622. An analysis of this case clearly shows that it does not militate in any way against the position petitioner has taken here. On the contrary, it tends to support petitioner's position. This Court there says:

> "Behmyer based his claim upon negligence in stopping the cars so suddenly *with knowledge of his position* and the slippery condition of the roof of the car, and upon the projection of the nail, which increased the danger and contributed to his fall."

There the declaration charged a knowledge of the dangerous condition of the roof and the perilous position of the employee. No knowledge is brought home, nor is it charged, to those on the locomotive in this case.

In the Behmyer case, while the fellow employees knew of the condition of the car and position of the injured man, the cars were moved up a hill and suddenly stopped. The slack ran in and then back again. This Court there recognizes that the running in and out of slack is an incident to the operation of trains. This Court then says:

> "No doubt a certain amount of bumping and jerking is to be expected on freight trains, *and under ordinary circumstances cannot be complained of.* Yet, it can be avoided if necessary, *and when the particular and known condition* of the train makes a sudden bump, *obviously dangerous* to those *known to be on top of the cars*, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty."

This is the identical principle established in the cases cited for petitioner in its original brief, viz: Southern Railway Co. v. Dickson, 211 Ala. 481, 100 So. 667; Austin v. Railway Co., 134 Miss., 226, 99 So. 3; Davis vs. Shirer, 288 Fed. 293.

In the Behmyer case a sudden stop was conceded. There were known conditions of danger. In the case at bar respondent alone says there was a lurch. And there is no dispute over the entire absence of knowledge on the part of those in the locomotive of any position of danger of respondent.

The Behmyer case concedes a very sudden stop due to the act of the engineer. Here the engineer, the fireman and the brakeman swear, and there is no dispute as to this, that nothing was done on the locomotive to cause a lurch or jerk. And it is further shown that if there was any lurch it must have been due to slack.

Fact That Respondent Fell No Evidence of Severe Lurch.

It is next urged that the fact that respondent fell is evidence that the lurch was unusual. An Alabama case is cited to this effect.

Respondent loses sight of the fact that this same lurch did not cause the flagman to lose his balance although he was standing and engaged in sweeping out the car which respondent was boarding. (R., p. 69.) The Circuit Court of Appeals for the Fourth Circuit in Davis *v.* Shirer, 288 Fed. 293, considered facts of this nature to be very pertinent.

Respondent did not consider the lurch severe until the trial. Two weeks after the accident he was given Form 31 to fill out. He took this home, answered the questions and mailed it in to petitioner. (R., pp. 36 and 37.) One of the questions related to the cause of the accident. The question and answer read:

> "A. Q. State in a succinct way the cause of the accident? A. Stepped on a piece of coal, gave down

and missed my foot step—was thrown back and knee striking cross ties." (R., p. 37.)

Respondent Admits That Testimony as to Cause of Lurch Mere Opinion.

Respondent urges that his testimony "that the engine gave a sudden lurch" was sufficient to go to the jury on the question of whether the engineer caused the lurch. In the same paragraph in the brief he says:

> "* * * and he was an experienced brakeman, just as much so as the other members of the crew in charge of the train, *and even though it might be said that he did not see the engineer cause the lurch*, he had the same right to state, *from his opinion*, what caused the lurch, as did the other members of the crew, and then it was a question for the jury to decide, and to which they had a right to apply their common every day experience as men, and to judge from all the facts, the surrounding circumstances, and from their experience as men, what caused the lurch or jerk." (Respondent's Brief, p. 9.)

Respondent here admits that any testimony of his that the engineer caused the lurch was *an opinion* and nothing else. "But," says respondent, "an opinion of mine is as good as the opinion of the others."

Petitioner has offered no opinions. The engineer says he did not do a thing to cause the lurch. (R., p. 62.) The fireman says the engineer did nothing. (R., p. 64.) The head brakeman, then on the engine, swears that nothing was done. (R., p. 68.)

These are facts and not opinions. Respondent charges that the "engineer on said train gave a very sudden and

very unnecessary jerk of said train." (R., p. 3.) It was incumbent upon him to prove it. He does not do so.

This Court in the case of Patton *vs.* Texas & Pacific R. Co., 179 U. S. 658, 45 L. Ed. 361, has this to say:

> "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & P. R. Co. *v.* Barrett, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Respondent has not adduced the evidence. According to his own admission he ventures only an opinion that the engineer caused the lurch. The facts show that slack may have caused the lurch. No negligence is proven.

Negligence Charged is That of Engineer and Not Train Crew.

It is urged that the Court was correct in refusing the instruction that if the crew of the engine did not know

that respondent was not on board, it was the jury's duty to find for petitioner. (R., p. 14.)

The negligence charged is that of the engineer. He is charged with having suddenly jerked the train. The courts hold that knowledge of the perilous condition is necessary to make the act actionable negligence.

Respondent says that for men on board the lurch was usual. But for men about to board it was unusual.

Respondent says he gave the signal to leave the station. He says he gave it to the fireman. He says that this indicated he was ready to go. The train moved out and moved fifty feet. No one on the engine knew of the fact that respondent was not on board. They had every reason to believe that he was. Respondent was standing by the last car of the train, the caboose. He was either aboard at the time of the alleged lurch or he was left.

The evidence shows without dispute that the engine crew did not know of respondent's position and certainly they had every reason to believe that respondent was aboard.

The court recognizes this but says the knowledge should be that of the entire train crew and not of the engine alone. Yet the engineer is the only one charged with negligence. And he alone operated the engine.

That there is nothing in respondent's brief to show that petitioner's position on the errors assigned is wrong is respectfully submitted.

Respectfully submitted,

W. S. WELCH,
ELLIS B. COOPER,
Attorneys for Petitioner.